

IN THE UNITED STATES COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GORDON ROY PARKER,	:	
	:	
Plaintiff	:	
	:	
v.	:	
	:	
JACQUELINE FAYE GOLDHAGEN,	:	Case No: 15-cv-3304-TON
	:	
Defendant	:	
	:	
	:	

ORDER

AND NOW, this ____ day of July, 2015, upon consideration of **Defendant's Rule 11**

Motion For Sanctions, It is hereby ORDERED that the motion is **denied** with prejudice.

J.

PLAINTIFF'S RESPONSE TO DEFENDANT'S RULE 11 MOTION FOR SANCTIONS

Executive Summary

Defendant never intended to have to litigate this motion, as its primary purpose was to blackmail Plaintiff into dropping this action under threat of the same defamatory allegations which gave rise to the defamation claims.

Defense Averments

1. DENIED. Plaintiff has already stated that Defendant is an actress. The remainder of the averment is subjective, conclusory, and more like pr/marketing copy. To the extent the remainder is factual, it is DENIED.

2. DENIED. Plaintiff was fixated on Defendant's *hypnosis*. He contacted her openly, honestly, under an easily searchable name (BettorOffSingle), He did this specifically because she had marketed herself as a *fetish model*, as this would guarantee Plaintiff a hypnotist who would not be offended by the (relatively mild) "sexy" content of the chess-improvement video (where winning is tied to the brain's attraction to beautiful women). Defendant's fraudulent misrepresentation as a fetish model left her in a situation akin to her entering a stripclub, pretending to be a stripper, and being surprised when a male customer asks for a lapdance. Moreover, sexiness and fixation on her body has been Defendant's meal-ticket in Hollywood for a decade. Plaintiff was induced by Defendant into believing she was something she was not.

3. DENIED. Defendant is the sole aggressor here, having created a controversy by threatening Plaintiff with a defamation action. Plaintiff had absolutely no intention of suing Defendant, and has done so only to preserve his free-speech rights, while "settling up" regarding the contract breach. Regarding defense counsel's reference to "fantasy worlds," the protective, vigilante, truth-be-damned *white-knight* is a similarly creepy stock character. Defense counsel's waxing poetic over Defendant in ¶1 of the motion could lend itself to similar stereotyping, and it was our Founding Fathers who asked *who protects us from our protectors?* With that said, compliance with the Daubert standard and the submission of supporting evidence would eliminate the layman's guessing game.

4. DENIED. Defendant's reliance on hearsay and internet defamation -- in a federal court pleading, no less -- serves only to further Plaintiff's arguments, while all but proving common-law malice and reckless disregard for the truth. The "information" upon which Defendant relies was placed there by others with an axe to grind against Plaintiff. Given its Section 230 immunity, Google cannot be considered a reliable source any more than a bathroom wall. The harassment allegation is conclusory and requires no response. To the extent a response is required, Defendant's claim that Plaintiff's posting to third-party websites concerning Defendant is harassment is not legally valid, as this is simple free speech in a public square, not direct contact. Even if it were direct contact, it was not harassment, but commentary on two legitimate issues of public concern: a) a SAG-AFTRA actress offering custom fetish videos; and b) the relative value of alternative medicine. Absolutely no harassment was intended or committed. By contrast, Defendant's conduct, including linking to a site which falsely warns the public that Plaintiff is a dangerous pedophile, with his physical location and picture, constitutes federal *cyberstalking* which is not even immune under Section 230.

5. DENIED. The averment is conclusory and requires no response. To the extent it requires a response, it is DENIED.

6. DENIED. The averments are conclusory, and require no response. To the extent they are not conclusory, they are DENIED. Specifically:

a) DENIED. But for Defendant's litigation threat, Plaintiff would never have filed suit. Defendant is fully aware that the very ED page over which Plaintiff is suing, and those tied to it, will spread her Rule 11 allegations, a *dog-whistle* for vigilantes to harass Plaintiff on her behalf (one already has by sending a threatening Yelp message). Defendant *ordered* Plaintiff to chill his speech or face a lawsuit, not realizing that this opened herself up not just to a lawsuit,

but to one not on her "home court." The instant motion is the opportunistic work of an invisible hand with extremely deep pockets, one which has threatened Plaintiff with "global litigation" on multiple fronts. A concurrent motion to conduct expedited discovery is being filed.

b) DENIED. Defendant surely knows a great deal about improper purposes, as its counsel is being paid for by an unnamed feminist organization with a preexisting dislike of Plaintiff, who injected itself into this action after the harried Defendant realized she had bitten off more than she could chew with her initial cease-and-desist SLAPP warning to Plaintiff. Defense counsel's laserlike attention on Plaintiff, rather than the true "villain" of its narrative, *Customs Club*, is extremely telling.

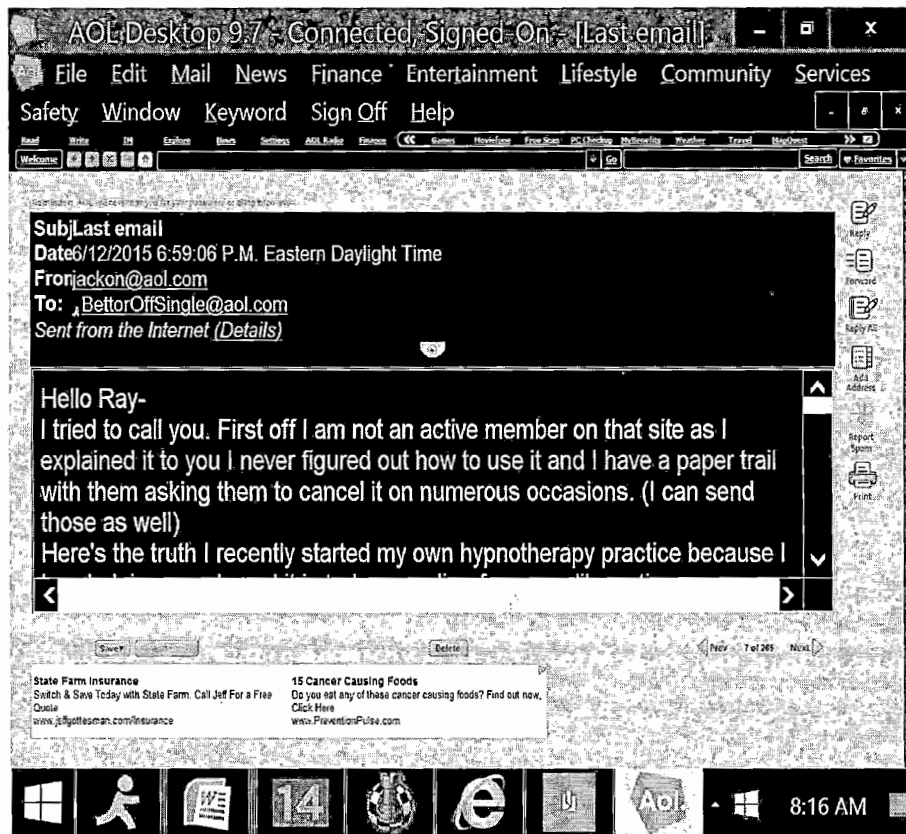
c) DENIED. Plaintiff Kettle asserts that Defendant Pot's reasoning is unsound.

d) DENIED. Plaintiff 1) derives little or no revenue from his work as a "PUA" coach or author; 2) but for feminists similar to the ones bankrolling Defendant repeatedly blaming PUAs for crimes like Elliot Rodger, Plaintiff's work would be on the backburner (his focus now is chess, eliminating elderly poverty, and "MGTOU" or *men going their own way*, ignoring rather than harassing women). Plaintiff's sole purpose in hiring Defendant was to create a hypnosis video for Plaintiff to use in an attempt to improve his chessplaying.

7. DENIED. The averment is conclusory; to the extent it is factual, it is DENIED.

8. DENIED. Plaintiff has every right to disseminate the lawsuit he filed to rebut Defendant's statements, and her attempt to chill his speech on Yelp, social media, and other websites. Defense had threatened a classic SLAPP action, one which would also violate the Dragonetti Act. Plaintiff has merely called her bluff, invited her to try her claim, and she has responded with an attempted Rule 11 character-assassination based on cynical gender stereotypes.

9. DENIED. Defendant was the aggressor against Plaintiff, ignoring his warning not to contact her by e-mailing him three consecutive times thereafter, prompting Plaintiff to speak out. Moreover, Defendant repeatedly engaged Plaintiff, not only initiating contact, but doing so in a manner which did not convey hostility, but instead a desire to resolve this issue "without courts or lawyers." *She even offered to make him three videos for free*, well after she supposedly took offense at his "deviance." As these videos were now worthless to Plaintiff, particularly after the trauma-inducing link to the ED-page, he declined. This is an e-mail from Defendant to Plaintiff, on June 12, 2015:



This is the full text of the e-mail:

Hello Ray-

I tried to call you. First off I am not an active member on that site as I explained it to you I never figured out how to use it and I have a paper trail with them asking them to cancel it on numerous occasions. (I can send those as well)

Here's the truth I recently started my own hypnotherapy practice because I love helping people and it is truly rewarding for me unlike acting or modeling. ***Yes I have done fetish modeling*** in my past I won't deny that that's why I originally joined the site. But ***hypnosis saved me from spending the next decade of my life being a softcore actress*** and it truly makes me feel fulfilled to help people. When you attacked my yelp I didn't sleep for a night because that was my baby and it meant the world to me. ***I apologize for posting that link*** and that's why I posted another rebuttal stating I do not know if the facts are true.

I would like to settle this without a court and without lawyers. If there is a way we could both have that ripoff review removed then let's figure out a way. Do you want a video? Is this what this is all about. Fine ***I'll tell you what I'll make you a video free of charge. I am an amazing hypnotist and you know that. So yes I will make you an amazing video! Hell I'll make you 3.*** Just stop with the harassment stop with law suits.

Sincerely
Jacqueline Holland
818-521-7971 (Emphasis Added)

10. DENIED. The averments 10(a-h) are conclusory; to the extent they are not conclusory, they are DENIED. Specifically:

a) DENIED. By way of further answer, Defendant was contracted specifically because she was sexy, and markets her sexuality extensively. The ***Customs Club*** website caters to "deviant" men, and Defendant had willingly participated on the site. Further, Defendant deliberately uses her sexuality to market her "vanilla" hypnotherapy practice to hypnofetishists, who create pretexts for therapy. Had Defendant not fraudulently misrepresented herself to Plaintiff, she would never have attracted his attention in the first place. Even with his attention, once it became clear she wanted no contact, Plaintiff moved on, as he had attempted to the moment the contract was breached.

b-h) DENIED. To the extent any of these averments are true, Defendant is merely stating the irrelevant obvious about why Plaintiff contracted for the video. The conclusory

allegations based on this obvious are denied. Plaintiff had no interest in Defendant beyond securing a video to help his chessplaying.

FN3. In footnote 3 to paragraph 10, Defendant imputes upon Plaintiff, the nonexistent desire for personal interaction. The entire purpose of the video was to preclude the need for this interaction, much like the entire purpose of recorded music is to avoid having to hire the band to play one's favorite song every time they wish to hear it. Defense counsel *needs* Plaintiff to conform to its imputations to justify its use of the judiciary to harass Plaintiff into silence.

11. DENIED. The averment is conclusory, requiring no response; to the extent it is not conclusory, it is DENIED. Specifically:

a) DENIED. Defendant called out Plaintiff with an accusation dating back to 1997; Plaintiff was merely rebutting her link, and clearing his name. Defendant brought those events into controversy.

b) DENIED. The false accusation that Plaintiff is a pedophile who wrote an essay about raping and murdering underaged gymnasts, is hardly a "hobgoblin." Indeed, Defendant is claiming life-altering injury for conduct far more mild, and one which does not present any danger of misguided vigilante "justice." It is those "enemies" who set a trap for Defendant, for her to take the fall for grinding their axe, which she did willfully, wantonly, and intentionally, because she did not like Plaintiff, and was quick to believe the words of others who shared her dislike, facts be damned. If posting a negative review of Defendant is harassment and cyberstalking, what is this? These "enemies," some of whom have mutual ties to Defendant, have made public threats of violence against Plaintiff.

c) DENIED. None of Plaintiff's lawsuits have ever been deemed frivolous, nor has Plaintiff ever been sanctioned under Rule 11. Indeed, Defendant is omitting mention of the

outcome in Parker v. Yahoo (2007), in which Plaintiff was the prevailing party. A copy of one of two eighty-minute hearings on the merits of the case (voluntarily withdrawn) should make clear that Plaintiff is being portrayed by Defendant in a false light by equating losing cases with frivolous ones is attached as Exhibit A and incorporated by reference. ***The judge praised Plaintiff for being on-point.*** Moreover, until recently, Plaintiff had not filed a lawsuit in over six years, while this action is the sole product of Defendant's cease-and-desist warning.

d-e) DENIED. The averment is denied as moot; Plaintiff has amended the Complaint. By way of further answer, the original complaint was properly pled, in a "colorful" style Plaintiff learned from Earl "Brother" Jones, the late, former District Attorney of Albany, Georgia, for whom Plaintiff worked at the Jones Law Firm in the fall of 2000. Nonetheless, Plaintiff has done what he can to accommodate Defendant's concerns, as the underlying case is valid no matter how pled. By way of even further answer, were Plaintiff Charles Manson, the contract at issue in this litigation would still have been binding.

12. DENIED. Defendant's argument is literally ***impossible***: she threatened a libel action against Plaintiff, which ***must*** be heard in Pennsylvania. Either a) her threat was baseless and fraudulent; or b) she was prepared to voluntarily submit to the jurisdiction of this Court in order to sue Plaintiff, who is merely suing her first under the Declaratory Judgment Act, in the very court which would rule on her threatened libel action. The ***only*** way Defendant could not be subject to jurisdiction in Pennsylvania would be for her to permanently waive her right to sue for any and all alleged defamation up to and including the present.

13. DENIED. This action is a legitimate constitutional challenge to 47 USC §230, which, ***according to various internet websites and Google links***, is unpopular, particularly among

victims of "revenge porn," women who would never have been victimized had Plaintiff's prior lawsuits been dismissed.

14. DENIED. The averment is conclusory, requiring no response; to the extent it requires a response, it is DENIED. The only possible constitutional application of Section 230 would require an affirmative showing of third-party authorship. An simple affidavit from Defendant to this effect would suffice. In this case, there is genuine doubt that 230 immunity would survive, even if not overturned. Moreover, Plaintiff has alleged in the Amended Complaint (§24) that Defendant a) made the statements her own; and b) added her own defamatory statements in addition to the ED link.

15. DENIED. The averment is conclusory; to the extent it is factual, it is DENIED. By way of further answer, a breach of contract claim has been properly pled.

16. DENIED. There is no factual averment to which a response is required; to the extent there is, it is DENIED.

17. DENIED. The averment is conclusory; to the extent it is factual, it is denied.
Specifically:

- a) DENIED. The record does not support this claim.
- b) DENIED. Defendant is not a mindreader, nor do the facts support its claim.
- c) DENIED. Defendant is not a mindreader, though Plaintiff would be willing to test his theory if Defendant would be willing to fund the attempt. Defense counsel is throwing a "temper tantrum" over finally encountering an adversary he cannot bully, blackmail, extort, or "paper blitz" into submission. Self-reliance, including learning how to defend oneself in court when threatened with litigation, is the American Way.

d-e) DENIED. By way of further answer, 1) the other cases did not involve people who had threatened litigation in this jurisdiction, and 2) none of Plaintiff's cases have ever been declared frivolous or vexatious.

18. DENIED.

Additional Averments

19. Plaintiff had only contacted Defendant because *she* had reached out to him to settle the case. Once he realized she had no interest in doing so, he ceased all contact, resigning himself to this litigation.

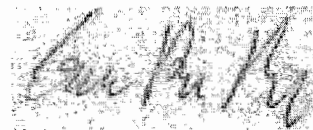
20. Just prior to filing the instant motion, defense counsel invited Plaintiff to call him, during which time he a) verbally abused Plaintiff, b) said that a "global organization" was funding Defendant's lawsuit (after she paid a certain amount), c) that this organization was preparing to jurisdiction-blitz Plaintiff with global lawsuits, including an unspecified one from Defendant, without attempting mitigation by putting Plaintiff on further notice regarding these allegedly impending actions. Defendant offered to drop all claims if Plaintiff did the same and agreed to permanent self-censorship regarding Defendant.

21. Contrary to Defendant's assertions, there are *two* separate public-interest motivations for Plaintiff's speech. The first is the convergence of Hollywood, the internet, and the adult-entertainment industry, with Defendant having placed herself into its epicenter, while the second is the much more serious issue of a "fetish" hypnotist performing stage hypnosis to an *underaged* audience. Internet stereotyping of the kind engaged in by defense counsel towards Plaintiff, were he to hypnotize underage girls at their birthday parties, would certainly pull no punches. Plaintiff has long held that minors and stage hypnosis, and the hypnofetish and hypnotherapy, do not mix.

22. Plaintiff is a known whistleblower, on SSDI, and currently in their *ticket to work* program. He avers, on information and belief, that the various lawfirms in this and previous actions have conducted themselves with an eye towards enforcing a blacklist on Plaintiff's potential lawfirm employment, by using the litigation to create conflicts which would preclude his employment with them, even through *ticket to work*. This creates an irreparable conflict of interest for any defense counsel which is a potential employer of Plaintiff's and a federal contractor; this is argued in a concurrent motion to disqualify defense counsel.

A Memorandum in support is attached.

This the 2nd day of July, 2015



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PLAINTIFF

**IN THE UNITED STATES COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p>GORDON ROY PARKER,</p> <p>Plaintiff</p> <p>v.</p> <p>JACQUELINE FAYE GOLDHAGEN,</p> <p>Defendant</p>	<p>Case No: 15-cv-3304-TON</p>
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**MEMORANDUM IN SUPPORT OF PLAINTIFF'S RESPONSE
TO DEFENDANT'S RULE 11 MOTION FOR SANCTIONS**

Plaintiff Gordon Roy Parker, in the above-styled action, submits this Memorandum in Support of his opposition to the instant motion.

BACKGROUND.

Defense counsel, funded by an unnamed, global feminist organization, has co-opted a relatively benign, though intriguing, contract dispute, causing it to morph into an all-out ***Battle Of The Sexes***, a spilling of a global internet "flame ware" over feminism into the federal court system. Defense counsel, with not a shred of affidavit in support of what purports to be its client's allegations against Defendant, has used the same fallacious debate tactics with a Kudzu-like internet presence, eschewing the more traditional route of averments based in fact, and supported by evidence. That this organization claims to be anti-bullying, while funding a Defendant who falsely accused Plaintiff of pedophilia, by linking to retaliation for when Plaintiff himself exposed a major case of child abuse, is mind-boggling.

With evidence -- and recent Supreme Court precedent -- cast to the wind, Defendant accuses Plaintiff of cyberstalking her, not by threatening her, or directly contacting her, but by *posting negative reviews online*. Her counsel now calls Plaintiff vexation, for having the temerity to defend himself when threatened with a cease-and-desist. In no way is Plaintiff, who merely attempted to hire Defendant for what she does best, the aggressor.

The instant motion is a desperate attempt to completely circumvent due process. Although Defendant claimed in its motion that a motion to dismiss was concurrently filed, Plaintiff has yet to locate it on PACER and has not yet otherwise been served. Without dismissal, Rule 11 sanctions are impossible. Defendant has placed a cart of explosives in front of the horse in the hope of literally blowing up this case in its favor.

LEGAL STANDARD

This is quickly becoming a complex civil litigation. Plaintiff preserves any and all defenses and claims not set forth here, for future use, should the need arise.

I. DECLARATORY JUDGMENT ACT

A party seeking declaratory relief under the DJA must present an "actual controversy" in order to satisfy the "case or controversy" requirement of Article III. It allows prospective defendants to sue to establish their nonliability and afford[s] a party threatened with liability an opportunity for adjudication before its adversary commences litigation. *Federal Practice Manual For Legal Aid Attorneys*, ¶9.3

II. RULE 11 MOTION FOR SANCTIONS

A. General.

"Rule 11 is not a fee-shifting statute." see Pavelic & LeFlore v. Marvel Entm't Group, 493 US 120 (1989). Rule 11 sanctions are an extreme measure, and should rarely be granted. That a lawsuit does not prevail does not automatically make it run afoul of Rule 11.

A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion. FRCP 11(c)(2)

A sanction imposed under this rule must be *limited to what suffices to deter repetition of the conduct* or comparable conduct by others similarly situated. FRCP 11(c)(4).

B. Rule 11 And Vexatious Litigation

Under [Defendant's home state of] California Code of Civil Procedure section 391(b), a vexatious litigant is defined as one who, while acting pro se, has done any of the following:

(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or a hearing.

(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence. Cruz v. Tilton et al., 06-CV-00883, E.D.Ca.

There is no such thing as a vexatious tortfeasor.

Plaintiff not only won his last case (Rule 41 settlement without sanctions is a win for the Plaintiff), but held his own against Microsoft, Yahoo, and the nation's most expensive, litigious IP attorneys (see Exhibit A), who rode the Acela back to their offices with their heads buried in their laptops to hide the shame of having been completely outlawed by a "vexatious, serial-litigant" pro se.

C. Rule 11 and Jurisdictional Waiver

In TES Franchising, C v. J Eric Dombach, No CIVA, 10-0017, 2010 WL 5023249 at *3 (EDPA 12/9/2010), the Court held that the jurisdictional defense was not waived, but deferred ruling on the Rule 11 motion until the Rule 12(b) motion to dismiss was heard; despite Defendant's claim to the contrary in the instant motion, no such motion to dismiss has concurrently been filed.

When a defendant makes it abundantly clear that it is attempting to litigate on the merits, however, jurisdictional objections are deemed waived. See, e.g., Gerber v. Riordan, 649 F.3d 514 (6th Cir. 2011). The Gerber court further held that a rule 11 motion would not be heard until after a traditional motion to dismiss. Also from Gerber:

"Defendants' filing of a general appearance with the district court constituted a voluntary acceptance of the district court's jurisdiction, and therefore, a waiver of Defendants' personal jurisdiction defense. We have held that "Under [Federal Rule of Civil Procedure] 12(h), a party waives the right to contest personal jurisdiction by failing to raise the issue when making a responsive pleading or a general appearance."

Id. at 1120; accord *Baragona v. Kuwait Gulf Link Transp. Co.*, 594 F.3d 852, 854 (11th Cir. 2010) ("A defendant normally . . . waives a personal jurisdiction defense if he or she has entered an appearance."); *Ladder Man, Inc. v. Mfr.'s Distrib. Serv., Inc.*, No. 99-4217, 2000 U.S. App. LEXIS 27982, at *7 (6th Cir. Oct. 31, No. 09-3790 *Gerber v. Riordan, et al.* Page 10 2000) (table). Therefore, Defendants' attorney's entry of a general appearance with the district court on behalf of Defendants on October 16, 2006 constituted a waiver of Defendants' personal jurisdiction defense.

III. SECTION 230 AND DEFAMATION

The elements of a defamation claim are a 1) false statement that Defendant either 2) knew or should have known was false, 3) wasn't privileged or consented to, 4) was communicated to a third party, 5) who understood its defamatory context, causing 6) pecuniary harm (generic citations omitted). For public figures, *Times v. Sullivan* (citation omitted) is the guiding precedent regarding actual malice. In Pennsylvania, "common-law malice" must also be present with a public figure. (citation omitted).

The key issue in this case is 47 USC §230(c) ("Section 230 immunity"), which applies to all third-party internet content. Specifically, this defamation claim will turn on *Paul v. Davis*, 424 U.S. 693 (1976), in which the dissent held that a constitutional right to reputation existed by itself, and the majority held that libel was a constitutional harm if, and only if, it resulted in a "secondary constitutional harm," such as loss of employment. Had this bedrock case been ruled upon in the present, an era where people determine reputations based on "websites and links to Google search results," it would have gone 9-0 in favor of establishing the right, one similar to the right to privacy, and a right recognized almost universally in the developed world, save for the United States' abominable immunity.

In Australia and the UK, not only is Section 230 immunity not recognized, but the *right to be forgotten* is considered a basic human right. In the United States, the Supreme Court has yet

to rule on Section 230. Plaintiff's interpretation of the law is that it cannot be used as a "sword," but rather only as a "shield," nor can it run afoul of his asserted constitutional right to reputation.

IV. BREACH OF CONTRACT

One of the most phenomenal legal minds of our time, Casey B. Green (defense counsel's son), perfectly explained the elements of a breach-of-contract claim in Pennsylvania:

In Pennsylvania, a breach of contract action involves *(1) the existence of a contract, (2) a breach of a duty imposed by the contract, and (3) damages*. J.F. Walker Co., Inc. v. Excalibur Oil Group, Inc., 792 A.2d 1269 (Pa.Super.2002). Additionally, it is axiomatic that a contract may be manifest orally, in writing, or as an inference from the acts and conduct of the parties. John Edward Murray, Jr., Cases and Materials on Contracts 184 (3rd ed.1983) (citation omitted).

The purpose of damages is to put the plaintiff in the position he or she would have been in but for the breach. Maxwell v. Schaefer, 381 Pa. 13, 21, 112 A.2d 69, 73 (1955); Harman v. Chambers, 358 Pa. 516, 521, 57 A.2d 842, 845 (1948); Mancini v. Morrow, 312 Pa.Super. 192, 204, 458 A.2d 580, 586 (1983). The measure of recovery and the method of evaluation that are adopted should in every case be so adjusted as to attain as nearly as possible the purpose of our system of remedial justice. This purpose is to *put the injured party in as good a position as the promised performance would have put him*, having regard both to the reasonable foreseeability of the harm and to the extent that it could reasonably have been avoided by the injured party himself. 5 Corbin on Contracts § 1005 at 63 (1951).

(From <http://contracts.lawyers.com/breach-of-contract/blogs/archives/18526-the-basics-elements-of-a-breach-of-contract-action-pennsylvania.html> (retrieved July 1, 2015 2:26pm)).

Plaintiff couldn't have said it better himself, and in this case what we have is the breach of, literally, a "promised performance."

V. FRAUDULENT/NEGLIGENT MISREPRESENTATION

Under Pennsylvania law, a fraudulent misrepresentation claim has six elements: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." Bouriez v. Carnegie Mellon Univ., 585 F.3d 876, 771 (3d Cir. 2009) (citing Overall v. Univ. of Pa., 412 F.3d 492, 498 (3d Cir. 2005)).

A party alleging fraud "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). The Third Circuit has held that to satisfy Rule 9(b), a plaintiff must "state the circumstances of the alleged fraud with sufficient particularity to place a defendant on notice of the 'precise misconduct with which [it is] charged.'" Dimare v. Metlife Insurance Co., 369 Fed. App'x 324, at *329 (3d Cir. 2010) (quoting Frederico v. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007) (alteration in original)). "This requires a plaintiff to either plead the date, time, and place of the alleged fraud, or inject precision into the allegations by some alternative means." Dimare, 369 Fed. App'x at *329.

ARGUMENT

Defense counsel "outwitted" Plaintiff into apparently waiving his twenty-one day notice period for the instant motion, but since he has no intention of withdrawing the Complaint, and is moving as swiftly as possible at every step in this litigation in the hope of a swift resolution, he will waive his twenty-one day objection, but not the objection based on a "minor" technicality: ***Defendant has not yet won this case.*** This motion should be stayed until such time as Defendant prevails.

Plaintiff has also filed a concurrent motion to strike the instant motion, based on its putrid attempted character-assassination of Plaintiff, with so many language violations that it would almost be quicker to point out the parts which are not prejudicial, slanderous, false, or otherwise strike-worthy.

I. EARLY SCRUTINY/JURISDICTION

Defendant claims that her location in California demands early scrutiny, yet Defendant, ***on her own initiative***, threatened Plaintiff with a libel action, her cease-and-desist order giving rise to Plaintiff's claim under the Declaratory Judgment Act.

Plaintiff's argument is simple: either a) there is no defamation controversy, and Defendant's threatened defamation action is prejudicially waived; or b) there *is* a controversy over which the Declaratory Judgment Act gives jurisdiction. It must be one or the other.

II. VEXATIOUS LITIGATION

Plaintiff does not even come close to meeting any of the elements set forth in Section II for the legal standard for vexatiousness: he has not lost multiple lawsuits in recent years (he won his last two), he has properly pled valid claims for relief in every action, some of his actions are whistleblower and public-interest lawsuits where resolution of the law is as important as the outcome (the Google judge noted that Plaintiff's case was an issue of first impression, while taking Plaintiff at his word that he would not vexate the issue). Indeed, in Parker v. Yahoo, Plaintiff "overturned" the Google ruling regarding implied license, overcoming what appeared to be a slam-dunk issue-preclusion argument by the defense (see Exhibit A).

Given that Plaintiff would never have sued Defendant, but for her threat to sue him first, it is not possible for him to be ruled vexatious; he is permitted to vigorously defend his rights when cornered. The instant motion amounts to the whining of a bully who is incredulous that his (or her) target stood his ground. It also represents the hidden agenda of a large, unnamed, global feminist organization which apparently has "had it in" for Plaintiff for quite some time, according to defense counsel.

III. IMPROPER PURPOSE (HARASSEMENT)

Defendant is accusing Plaintiff of attempting to extort her into having a relationship. There is absolutely no evidence on (or off) the record to support this claim; it is simply untrue. Defendant's conduct, as set forth in Plaintiff's response to the instant motion, actually supports this claim more in reverse.

A. Defendant, Not Plaintiff, Is Vexatious.

Defendant is arguing that Plaintiff is using a process initiated by *her* to "force his way into her daily life." If so, Plaintiff's mind-control powers exceed Defendant's by a factor of one hundred. He had no intention of litigating this matter prior to the cease-and-desist threat. Had Plaintiff wanted a relationship with Defendant, he could easily have visited her for a live session under pretext, like most of her male clientele. By this point, Defendant disgusts Plaintiff, and he would rather this litigation be fast-tracked as much as possible.

B. Plaintiff Was Not Attempting To Force A Relationship.

Defendant repeats this allegation yet again, yet it has no basis in fact. The transactional history clearly indicates that Defendant has contacted Plaintiff personally, despite being asked not to, and that Plaintiff has done no more than speak *about* Defendant, not *to* her. She is attempting to stifle his first-amendment rights with a repeat of a defamatory statement which gave rise to the defamation claim (ACmplt, ¶24).

Even more curious about this allegation is that defense counsel has recently e-mailed Plaintiff, informing him that Defendant is going to sue him (for unspecified conduct), in an uncertain jurisdiction, thus further involving him in her life, completely involuntarily on his part. Plaintiff would love nothing more than a swift, just resolution to this action so that all parties may continue on with their lives. What Defendant wants, however, is to silence Plaintiff's free speech, which she knows she cannot accomplish without the false imputation of a nonexistent romantic obsession for a thirty-four year-old actress whose career is fading so rapidly that, in her own words, hypnosis is all that stands between her and a career in softcore pornography.

C. Extracurricular Publication Of Complaint.

This lawsuit is newsworthy on many fronts, and will become increasingly so. Plaintiff's "haters" have waited, *en masse*, for someone to "take him down," and Defendant is the pawn which has been sent into enemy territory. Ironically, the instant motion found its way onto scribd.com at 8:07 pm the day it was filed:



Internet coverage and dissemination of lawsuits are a fact of modern life; Plaintiff has sued to restore his reputation, and part of that is raising public awareness about the suit, which has an even bigger audience of those interested in litigation relating to Yelp reviews and the level of protection which should be afforded that speech. Defendant voluntarily opened this can of worms.

D. Plaintiff's PUA Business Is Irrelevant.

Defendant has misconstrued everything from the nature of Plaintiff's dating-advice business, to its scant income (less than \$20 a month), to the fact that Plaintiff no longer markets

his work, except passively. It is free because his work has been plagiarized to death, including by Hollywood (*The Game* and *VH-1's The Pickup Artist*). Defendant's partner, Erika Jordan, has appeared on a PUA video for the much-maligned *Real Social Dynamics* (a competitor), while Defendant herself has played characters in fiction based either directly or indirectly on Plaintiff's writing. None of this is relevant, however, as this has never been a factor in any transaction in controversy; Plaintiff was merely attempting to secure a hypnosis video for chess improvement.

Defendant's *stars-in-his-eyes* argument concerning Plaintiff fails any reality test. Unlike his PUA rivals, who hire "paid to party" women like Defendant and Erika Jordan to boost their images (Plaintiff calls them *Random Hot Chicks*), Plaintiff is a "true indie" unfazed by fame and status. His half-brother was married to Michael Learned, wrote an episode of *The Waltons*, and was one of the head writers on *Nurse*, before leaving the industry. In 1984, Kenneth Anger saw Plaintiff on the street and offered him the lead in *Lucifer Rising II*. Diane Lane dated Plaintiff's cousin for three years in the 1980s and Plaintiff shared a lone holiday meal with her rather than hit on her or "network her." Plaintiff had more than enough connections to fame from an early age to exploit at his mercy.

If anyone has stars in their eyes, it is more likely defense counsel, who may be projecting *his own fantasies* onto Plaintiff to justify his utility to Defendant. This would not be the first time something like this has occurred; indeed, the "pedophile" essay in controversy here was once republished by Derek "Odious" Trunk, who imputed pedophilia on Plaintiff, and who is now serving seventy-five months in federal prison for trafficking in child pornography. Who protects us from our protectors is as valid a question as any.

IV. COGNIZANT CLAIMS HAVE BEEN PLED

Defendant argues the absence of a cognizable claim by Plaintiff. The only way this could be possible is if Defendant has no intention of carrying out its threat to commence an action for Defamation, for which Plaintiff has extended this invitation. Absent this threat, this lawsuit would not exist. A cognizant claim for declaratory relief most certainly does exist; this claim is therefore cognizant.

A. A Cognizant Claim For Breach Of Contract Was Alleged.

Defendant claims that, because no money changed hands, a valid contract did not exist. This is wrong on its face, particularly since the money would have changed hands were it not for the breach. The underlying question seems akin to whether or not Plaintiff had grounds for terminating the contract due to Defendant's conduct, and his subsequent lack of trust in her, which has made suing for simple performance of the hypnosis video an inadequate remedy. Defendant claims she was unaffiliated with *Customs Club*, which implies that they fraudulently misrepresented to Plaintiff that she had. Despite this, it is *Plaintiff* who Defendant has targeted with her attorneys, while strangely leaving *Customs Club* untouched.

The three basic elements are clearly met; the main question is interpretation and measure of damages and remedies. Plaintiff knows that for \$325,000.00 he will have no difficulty finding someone to work with him; indeed, Defendant agreed to do so for \$1,000.00.

Defendant's allegation of an *uncommunicated fantasy* was the hallucination, as Plaintiff held no such fantasy. Rather, his reference to *potentially* commercializing their collaborative hypnosis work was listed among the damages. As "songwriter" and "singer," had the custom video had an extreme market value, it is always possible that Defendant would further license the work. That her partner, Erika Jordan, has done "PUA" videos (Defendant

grossly mischaracterizes Plaintiff's work), and that Defendant has "booked everything" for the past year, plus the ***binding contract*** to produce one video, makes this claim real and legit. Other damages include the loss of the video itself, and its enjoyment, much like a concert which is cancelled. The level of damages should be decided by a jury.

B. A Cognizant Claim For Defamation Was Pled.

This lawsuit is a constitutional, ***as-applied*** challenge to 47 USC §230, made in good faith.

C. A Cognizant Claim For Fraudulent Misrepresentation Was Alleged

Plaintiff's damages for having been essentially ***catfished*** by a woman fraudulently or negatively misrepresenting herself as an adult entertainer are the easiest to quantify and describe. But for the fraud, Plaintiff would never have opened up to Defendant, never solicited her for the video, and never engaged in any of what he thought was welcomed conduct for which Defendant later chastised him, misdirecting her anger that should have been focused on ***Customs Club***, the true "villain" of this saga. Because Defendant willingly contracted with them, and cannot erase her past, she has waged all-out internet and judicial war with Plaintiff in an attempt to silence his attempt to do the opposite, well within his First Amendment rights.

Plaintiff Is Not "Mentally And Physically Unfit To Work Or Do Business"

Defendant has taken pleadings from other lawsuits, often spoken in character, and deliberately misconstrued them to suit its malicious agenda.

Defense counsel claims that its client would never "dream" of doing business with Plaintiff, yet she had done just that. After cheating Plaintiff out of a chunk of his ***\$867.00*** SSDI check, Defendant -- a federal contractor in a city where Plaintiff is in the ***ticket to work*** program -- avers that Plaintiff is "***certainly not physically or mentally fit to undertake any ambitious business***".

deal." (Memo, p.17). The Social Security Administration disagrees, as it has qualified Plaintiff for its *ticket to work* program. Defense counsel, a federal contractor and potential employer of Plaintiff, is attempting to achieve the extrajudicial objective of blacklisting Plaintiff from office work. As the UPenn case (which Plaintiff recently moved to reopen) develops, much more will become clear.

"Hypnosis She Could Have Performed In Front Of Her Mother"

In its Memorandum, Defendant characterizes the chess-hypnosis video as something she "could have performed in front of her mother." *When Harry Met Sally* jokes notwithstanding, Defendant's breach of her fiduciary duty to Customs Club and the contract occurred *before* she had received the script, which involved "extreme PG-13 hypnosis" with similar costuming, voice, and movement to that displayed in her bread-and-butter "*Skinemax*" roles. Though hardly as extreme as the "fetish" requests (e.g., Exhibit 8) she attempts to blame Plaintiff for (in)directing her way with his commentary (rather than her own conduct), the chess video was anything but tame; it was just *sexy*, with the beauty playing a legitimate role in the "therapy," rather than crude.

D. JURISDICTION IS PROPER

Is Defendant suggesting that Plaintiff *move to California* and file there? No doubt, if he did, and he could, she would say he was stalking her. Nevertheless, that bridge should remain uncrossed, as the case belongs here.

See the argument on Rule 11 and Jurisdiction, which applies here. Even without the Declaratory Relief Act, alternative jurisdiction is conveyed numerous ways: i.e., damage occurring in Philadelphia, the contract between the parties, etc., to be fleshed out when Defendant actually moves for dismissal on those grounds. Defendant, while claiming not to have

filed suit here, has entered a general appearance, and has ***promised*** to file a libel action; Plaintiff merely readied the venue for her entrance, but Defendant is fashionably late to making the claim.

The case cited smugly by Defendants, World-Wide Volkswagen Corp. v. Woodson, 444 US 286, had to do with tires which caused an accident while on the road in a state with which the tiremaker had no contacts, and certainly does not apply here. The damage to Plaintiff from the cease-and-desist was felt here, since Plaintiff will have to defend such action here. Defendant, not Plaintiff, haled ***herself*** into this jurisdiction.

V. SANCTIONS ARE INAPPROPRIATE

Defendant's unsound, irrelevant, and factually inaccurate arguments do not justify so much as a single sanction against Plaintiff. Indeed, it is the instant motion which runs afoul of Rule 11, part of a much larger, more vicious campaign to exterminate Plaintiff's free speech by, as Defense counsel put it, "taking away his computer and his shoes." Someone should tell Defense counsel that poverty does not work that way, though Defendant has never truly established that Plaintiff is even in fact poor.

VI. CONCLUSION

For the foregoing reasons, the instant motion should be **denied**. A form of order is attached, as are concurrent motions to disqualify counsel, and to strike the pleading.

This the 2nd day of July, 2015



Gordon Roy Parker, Pro Se
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PLAINTIFF

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GORDON ROY PARKER,)	07-CR-2757
)	
Plaintiff,)	
)	
vs.)	
)	
YAHOO, INC., et al,)	Philadelphia, PA
)	January 27, 2009
Defendant.)	9:29 a.m.

TRANSCRIPT OF RULE 16 STATUS CONFERENCE
BEFORE THE HONORABLE MARY A. McLAUGHLIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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For the Defendant
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I N D E X

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By Mr. Mishkin

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1 (The following was heard in open court at 9:29 a.m.)

2 COURTROOM DEPUTY: All rise.

3 THE COURT: Good morning everyone.

4 MR. PARKER: Good morning, Your Honor.

5 MR. LANE: Good morning, Your Honor.

6 MR. MISHKIN: Good morning, Your Honor.

7 THE COURT: Please be seated. All right, we're here
8 this morning of course in the case of the Gordon Ray
9 Parker --

10 MR. PARKER: Roy. I'm sorry.

11 THE COURT: I'm sorry, sir?

12 MR. PARKER: I'm sorry, it's Gordon Roy Parker.

13 THE COURT: Oh, what did I say? Ray?

14 MR. PARKER: Ray.

15 THE COURT: I'm so sorry.

16 MR. PARKER: That's okay.

17 THE COURT: Gordon Roy Parker versus Yahoo and
18 Microsoft Corporation and thanks, everybody, for being here.
19 Let me be sure I know everybody. Obviously I know Mr. Parker
20 or remember Mr. Parker and Mr. Lane, this is Mr. Lane, and Mr.
21 -- sir, say your name again for me?

22 MR. MISHKIN: My name is Jeremy Mishkin, Your Honor.

23 THE COURT: Mishkin -- I'm so sorry.

24 MR. MISHKIN: Yes, Your Honor.

25 THE COURT: I couldn't read your handwriting there.

Colloquy

4

1 All right, counsel and Mr. Parker, the purpose of this
2 morning's hearing -- it's not a hearing really but a
3 conference and we're doing it on the record because obviously
4 Mr. Parker is pro se so I think it's important that we do
5 that, is to discuss a schedule for the case.

6 Now as I look at all the materials and the papers,
7 and of course my earlier decision, what we have left is the
8 plaintiff's claim of direct copyright infringement based on
9 any continued display or use of his works after the filing of
10 the lawsuit, because everything else I had dismissed, and then
11 we have various counterclaims by the defendants against Mr.
12 Parker. Mr. Parker, is that your understanding of what's
13 left?

14 MR. PARKER: Did you get my amended Rule 16? I
15 filed something on Friday, something that was bare bones
16 because I couldn't find the form and I re-did it over the
17 weekend.

18 THE COURT: Yes, I think we have it, yes.

19 MR. PARKER: Okay.

20 THE COURT: Did I -- just for the record, though,
21 did I state correctly what you believe the claims are that are
22 left?

23 MR. PARKER: Well there are counterclaims, yes --

24 THE COURT: Yes.

25 MR. PARKER: -- and you dismissed all but the direct

1 infringement --

2 THE COURT: That's what I just said --

3 MR. PARKER: Yeah.

4 THE COURT: -- yes, okay.

5 MR. PARKER: Everything in accordance with your
6 orders, yeah.

7 THE COURT: Mr. Lane, is that your understanding of
8 what's left?

9 MR. LANE: It is, Your Honor, however, there's been
10 a development this morning.

11 THE COURT: Oh.

12 MR. LANE: Yahoo has settled with Mr. Parker --

13 MR. PARKER: Pending your approval --

14 MR. LANE: -- pending the Court's approval of course
15 and both sides have agreed to dismiss their claims.

16 THE COURT: Okay. Okay, do I need to approve it?

17 MR. LANE: I have a --

18 THE COURT: Am I missing something here?

19 MR. LANE: I just got the executed so ordered copy
20 of it.

21 THE COURT: Okay, sure.

22 MR. LANE: I'd like to hand that up to the Court.

23 THE COURT: Sure, why don't you just hand it up. So
24 this is Mr. Mishkin -- no, Mr. Lane --

25 MR. LANE: Yes.

1 THE COURT: Okay, so Mr. Lane from Yahoo -- let me
2 take that, all right -- yes, I don't even think I need to sign
3 it -- well I guess maybe I do because we have another
4 defendant. I take it, Mr. Mishkin, you don't have any
5 objection to this?

6 MR. MISHKIN: No, Your Honor, I have no objection.

7 THE COURT: Okay. I will sign it and I guess we can
8 excuse you, Mr. Lane, if you'd like to be excused.

9 MR. LANE: I may just wait to talk to Mr. Mishkin
10 afterward --

11 THE COURT: Of course.

12 MR. LANE: -- but I appreciate the Court's time and
13 it's been a pleasure, Your Honor.

14 THE COURT: More than welcome to have you stay.
15 Thank you very much --

16 MR. LANE: Thank you.

17 THE COURT: -- also from my end as well. Thank you
18 very much, Mr. Lane. Okay, Mr. Mishkin, all right, is that
19 your understanding of what's left, Mr. Mishkin?

20 MR. MISHKIN: Yes, Your Honor, and I don't obviously
21 know what the terms of this settlement are. We did explore on
22 the telephone conference as per Your Honor's order the
23 possibility of settlement and I don't know whether the terms
24 that Mr. Parker has agreed to would be offered to my client as
25 well --

1 THE COURT: Right.

2 MR. MISHKIN: -- nor what those terms are --

3 THE COURT: Right.

4 MR. MISHKIN: -- but I'd certainly be happy to
5 consider it --

6 THE COURT: Right.

7 MR. MISHKIN: -- and make sure my client gives it
8 consideration if they are.

9 THE COURT: Sure. Mr. Parker, are you prepared to
10 tell us what that is?

11 MR. PARKER: No, because we have a different set of
12 facts here and if they want to make an offer, I believe Rule
13 68 covers that if they want to do it formally. Informally, I
14 mean -- I generally -- I would leave it up to them to offer me
15 something. I mean, I'm not looking to demand anything.

16 My main concern was to settle the copyright issue
17 which affects my own business as much as theirs because I
18 cannot go putting stuff on the internet until I know what --
19 what I -- the limits are.

20 The rules just haven't been laid down unless you go
21 by the old rules which were pre-internet where opt out isn't
22 there so the -- you know, the DMCA created a lot of clouds and
23 I have a -- I have an internet publishing company with a long
24 history of books that date back to 1998 websites so this
25 wasn't a minor issue.

1 I have books coming out in the future which will
2 also be affected by these rulings so for me, it was more of an
3 issue just -- you know, again, I'd like to see the law
4 resolved as much as -- I have standing because it affects me
5 but -- you know, it's very common for companies to file the
6 declaratory just like they did or for damages as I did because
7 I believe there was a violation.

8 But absent the violation it's still beneficial I
9 think to all involved to get some kind of law like you laid
10 down. I mean, you had a very extensive hearing. The
11 Publisher's Guild case in New York was just polled (ph
12 9:33:36)-- I think settled for \$125 million and what seems to
13 be happening is you get two classes of publishers here.

14 You get the big mainstream publishers who these
15 companies like Google don't go after or they settle and then
16 they cut a deal with them or people like me who can't fight
17 them so I'm somewhere -- I'm like in -- one foot in each world
18 where I have a standing, I have a case and some ability to
19 bring it -- I'm not saying -- you know --

20 THE COURT: Okay, yes.

21 MR. PARKER: I've worked in law offices before
22 enough to know how the system works.

23 THE COURT: Sure, sure. Well, Mr. Parker, though
24 tell me, putting aside whatever the settlement was with Mr.
25 Lane's client, I mean, normally what I do at a Rule 16

1 conference is say to the plaintiff --

2 MR. PARKER: How much would I settle for?

3 THE COURT: Well not necessarily but what are you
4 looking for in the case?

5 MR. PARKER: A win.

6 THE COURT: Not necessarily what you're settling but
7 what is it that you're hoping to get out of this case?

8 MR. PARKER: Justice, a win, damages -- you know,
9 standard --

10 THE COURT: More specific. More specific.

11 MR. PARKER: What I outlined in the complaint. I
12 mean, I believe my copyrights were violated, I believe that
13 what they --

14 THE COURT: Well do you want them to stop picking up
15 your material? Is that what you want?

16 MR. PARKER: Only if -- well again, without the law
17 being laid down, I want the -- I want the law to be applied
18 equally to everybody on the internet so that I know what the
19 law is, don't violate it in the future and then and do not
20 have a situation where some companies have rules that don't
21 apply to other companies.

22 THE COURT: Yes.

23 MR. PARKER: And in fact some circuits have rules --
24 you know.

25 THE COURT: Yes.

1 MR. PARKER: I mean right now if you defame someone
2 in a search engine, if I bring a Section 230 case in the
3 Seventh Circuit I have three favorable rulings in my favor.
4 If I bring it here I have nothing. I have Green versus AOL.
5 If I go over to the Seventh Circuit I have two rulings I can
6 quote that bring the whole Section 230 into question and until
7 the Supreme Court deals with that, I pretty much pulled off
8 the internet.

9 That's what I was saying, I don't know what the
10 controversy is. I've not threatened them with any lawsuits
11 over the future, anything that they're talking about. Fair
12 use -- they already have implied license. So on their side --

13 THE COURT: Right.

14 MR. PARKER: -- let's see. I'd like to know what
15 these claims are against me that separate me from the class of
16 individuals that don't leave their content password protected
17 on the web like the New York Times or like Field -- Field
18 versus Google is quoted, but Field was an attorney who wrote
19 poetry, copyrighted it specifically because he I think wanted
20 to push the envelope, but he wasn't making a living or trying
21 to make a living on the internet as a publisher, which is what
22 I am.

23 What would I settle this for? I mean, again, I
24 would like -- I do want some damages for the past copyright
25 infringements that I will be -- well, not -- well past now but

1 I mean not -- you know -- for the continued display. See,
2 once you start a case, the rules pretty much say you have to
3 finish it so if I go in there, I'm not going to pull back and
4 say oops -- you know, the rules just from what I gather don't
5 really -- they frown on that. You know, don't start something
6 you can't finish so --

7 THE COURT: The Rules of Civil Procedure you mean?
8 The Court Rules?

9 MR. PARKER: Well, if I -- if I were to just file a
10 Rule 41 and voluntarily pull this that's considered -- they
11 would prevail. I mean, and not just in a -- in a minor way
12 but --

13 THE COURT: Right. Right, no, no, I --

14 MR. PARKER: -- because I would have wasted their
15 time and the Court. I didn't file this with the idea of
16 pulling back -- you know, halfway through so I'm not oriented
17 towards a settlement --

18 THE COURT: Right.

19 MR. PARKER: -- unless they're going to offer me
20 something specific.

21 THE COURT: Okay, all right. Well --

22 MR. PARKER: Do you want a dollar amount? Do you
23 want -- I mean, I --

24 THE COURT: All right, let me turn to Mr. Mishkin
25 for a moment.

1 MR. PARKER: Okay.

2 THE COURT: Mr. Mishkin, has Microsoft stopped --
3 not the way I want to say it probably -- picking up Mr.
4 Parker's materials --

5 MR. PARKER: Can I object? I guess not.

6 THE COURT: -- in their search engines?

7 MR. MISHKIN: Your Honor, the completely mechanical,
8 automatic spidering of the web goes on unless an individual
9 has taken the very well known and easy to implement steps to
10 opt out of that. I assume by now, Mr. Parker, who claims he
11 didn't want this spidered in the first place, has finally
12 implemented those processes although he didn't before --

13 THE COURT: Right.

14 MR. MISHKIN: -- before now and so to be honest,
15 Your Honor, this is a purely automated process. I don't want
16 to make a misrepresentation to the Court about what that
17 spider is hitting today. If Mr. Parker has taken the steps to
18 mitigate the -- the problems that he claims were caused by
19 this problem, then absolutely the spidering system will not
20 pick up his material.

21 But, if he continues to decide on his own as is his
22 right to expose his material to all spiders whether MSN's,
23 whether it's Yahoo's, whether it's Google's, then those purely
24 automatic functions will continue and so -- I'm sorry for the
25 long answer, Your Honor --

1 THE COURT: No, no, that's fine.

2 MR. PARKER: I know what he's saying.

3 THE COURT: No, I know what --

4 MR. PARKER: He's saying --

5 THE COURT: -- he's saying too, Mr. Parker -- hold
6 on for a second -- let me ask you, sir, have you opted out
7 that mechanical way?

8 MR. PARKER: I've taken all of my original -- most
9 of my original content off my site. Let me -- can I just say
10 a couple things? First off, your ruling on what they're
11 looking to do is equate password protection with copyright
12 protection. Yesterday I was watching a full length movie
13 that's usually for sale You Tube.

14 I found it on the web. There was no password
15 protecting. I can watch a You Tube video without logging into
16 You Tube.

17 THE COURT: The question, sir, is have you done the
18 technical things --

19 MR. PARKER: Oh, I'm -- I have --

20 THE COURT: -- you have to do to opt out of the
21 search engine?

22 MR. PARKER: -- I have pulled my -- most of my
23 content. I have articles that I put up and I have a horse
24 racing site that I put up --

25 THE COURT: Okay.

1 MR. PARKER: -- I have a chess site sometimes.

2 THE COURT: Right.

3 MR. PARKER: As I understand it, your ruling said
4 that implied license could be revoked by the filing of a
5 lawsuit which in that case --

6 THE COURT: No, I didn't say that. I said that that
7 was a possibility and I would need further briefing on it.
8 Mr. Parker, I have a factual question to you -- and I'm not
9 saying you should or shouldn't have but I just want to know so
10 I know where we're going --

11 MR. PARKER: I haven't totally shut down my site,
12 no, I do not --

13 THE COURT: I didn't ask you about turning down your
14 site --

15 MR. PARKER: Oh. I don't use robot stock text
16 because it is too complicated and not -- it's -- I don't know
17 how to implement it.

18 THE COURT: Okay. So you have not opted out --

19 MR. PARKER: No, I have not used the robot --

20 THE COURT: -- of the search engine --

21 MR. PARKER: -- the text or --

22 THE COURT: Okay.

23 MR. PARKER: Yeah.

24 THE COURT: All right. All right. Mr. Mishkin --
25 but you would like them to stop doing it is what you're

1 telling me?

2 MR. PARKER: First I would like to know what the law
3 is once it's resolved. As far as I'm concerned, precedence
4 says an opt out has never been recognized. Now this Court can
5 obviously carve out an exception for the internet, but if you
6 do that, again, you're equating password protection with
7 copyright protection.

8 That denies my audience the right to just come to my
9 website and read my stuff without giving me their email
10 address which they would have to --

11 THE COURT: Okay.

12 MR. PARKER: -- do to get a password.

13 THE COURT: Okay. All right --

14 MR. PARKER: Also, if you --

15 THE COURT: -- slow down for a second --

16 MR. PARKER: -- if there are a thousand search
17 engines I'm going to have to opt out with every one of them
18 which takes --

19 THE COURT: Well my -- I can't -- I mean, I'm not
20 going to be able to solve that problem.

21 MR. PARKER: Right.

22 THE COURT: I have a very narrow issue here before
23 me and obviously, you've settled with Mr. Lane before you had
24 a legal ruling --

25 MR. PARKER: Difference set of facts.

1 THE COURT: I'm so sorry? No, I understand, I
2 understand. But all that I'm saying is that on at least those
3 sets of facts, you didn't want to get a ruling on it so I'm
4 trying to see if we could think of a way to resolve the
5 lawsuit, which you're perfectly entitled to do --

6 MR. PARKER: Okay. Can I say --

7 THE COURT: -- to resolve it or not.

8 MR. PARKER: Actually what happened was we have a
9 redundant -- we have two attorneys who are basically seeking
10 attorney fees against me for the same thing.

11 If you're at a blackjack table and you can win the
12 same amount of money with a one dollar -- one chip or two
13 chips or you can lose two chips or you can settle with one of
14 the dealers and have one chip at stake for the same thing, it
15 just makes sense in the interest of judicial economy and in
16 limiting my risk on the downside, the longer this trial goes
17 on, the longer it's resolved, I could wind up with their
18 attorney bills which would bankrupt me beyond whatever
19 mitigation --

20 THE COURT: Right.

21 MR. PARKER: -- or limits. I don't know of any
22 constitutional limits. Now also, I have -- this Court once
23 ordered a psychiatric examination of me for reasons I'm not
24 going to get into but they're a little more complicated than
25 they might appear on the surface, but the point is if I am

1 mentally disabled or physically disabled -- I mean, I'm not
2 disabled disabled but I'm not exactly the young man I used to
3 be.

4 What if somebody with a serious disability in my
5 position puts up a website and gets sued for declaratory
6 relief -- say they have Asperger's, say they have ADHD, say
7 they have ODD, say they have IED -- any of these tons of
8 disorders.

9 I do medical transcription so I hear of a lot. How
10 would they defend themselves without an attorney? Where's the
11 equal access? I mean, where would they get a trial? I'm not
12 here -- see, this is the first time I've been a defendant in
13 this Court. I have never been a defendant before so the
14 voluntary aspect of that is gone. I've been dragged into
15 this.

16 THE COURT: Right.

17 MR. PARKER: If the counterclaims are just a device
18 to get me to settle -- the main thing is the law. You have to
19 -- the main issue that really resolved based on what you said
20 is whether implied license can be revoked by a lawsuit. If
21 you say that it can't then this case is over on my end because
22 I have no win. If you say that it can however, then I
23 probably -- you know, then we have something -- you know, a
24 triable issue.

25 I thought that -- when I saw the ruling you

1 basically turned this into a case of my personal copyright
2 after the filing of the lawsuit might give rise to liability.
3 There's nothing here that applies to everybody.

4 But on the other end, this looks like a class
5 action, that they just decided that they'd rather go through
6 me than some big defendant because I don't see the difference
7 between them taking the content off of my site and taking the
8 New York Times' content off of the site, or me taking the New
9 York Times' content, running it through my site in something
10 like the implied license news.

11 Whatever I find on the net just put on my site and
12 then let them come to me.

13 THE COURT: All right --

14 MR. PARKER: I could sell --

15 THE COURT: -- Mr. Parker, I just --

16 MR. PARKER: -- a lot of advertising in that
17 time --

18 THE COURT: Okay, all right, I just need to hone in
19 a little bit. I have a 10:30. I have a bunch of lawyers --

20 MR. PARKER: That's okay. I'm just trying to
21 summarize --

22 THE COURT: -- troop of lawyers coming in.

23 MR. PARKER: -- for you as best --

24 THE COURT: Okay, all right. So but my question to
25 you is do you want to pursue a resolution? I could -- I mean

1 we could talk about it today. I could have you go to a
2 Magistrate Judge who could talk about it with you.

3 Now let me ask you, Mr. Mishkin, would you agree --
4 I mean have you explored this with your client, is this a
5 possibility that you would -- notwithstanding your position
6 that Mr. Parker needs to do the technical thing to stop the
7 search engine from picking up his material -- but would you be
8 willing -- is it technically possible, would you be willing to
9 go in or your client and stop it?

10 You know, do something yourself to stop the search
11 engine picking up any of his material, his websites on the
12 internet, would you be willing to do that and then if in
13 return Mr. Parker drops his claims, to drop your
14 counterclaims?

15 MR. MISHKIN: Your Honor, I would certainly
16 recommend to my client that if Mr. Parker's desire is for our
17 search engine spider to cease it's automatic search of
18 whatever the websites are that he designates in as part of a
19 resolution of both his claims and Microsoft's counterclaims, I
20 would recommend that to my client, but I confess that I
21 haven't specifically asked that question to my client so I
22 don't want to --

23 THE COURT: Sure.

24 MR. MISHKIN: -- make the representation to the
25 Court that I already know the answer. I don't.

1 THE COURT: Sure.

2 MR. MISHKIN: But I would certainly recommend it.

3 THE COURT: Sure. So he would recommend that, he
4 can't guarantee it. So think about it, Mr. Parker.

5 MR. PARKER: Well, I can tell you my position, it's
6 very clear.

7 THE COURT: Yes.

8 MR. PARKER: First off, you've already legitimized
9 opt out copyright with your previous rulings. If I drop this
10 case that stays in tact with very little likelihood that this
11 issue is going to be pushed by anyone because anyone with the
12 money to push it -- I -- I mean, I -- when you say if I drop
13 the case, I mean -- I -- this case wins in almost every other
14 country other than the US.

15 This case wins in England, this case wins in
16 Belgium, this case wins in Australia --

17 THE COURT: Sir, I really do -- and I don't want to
18 cut you off but no, but it's entirely up to you, if you don't
19 want to settle it --

20 MR. PARKER: The ruling is --

21 THE COURT: -- then you don't have to.

22 MR. PARKER: Can implied license --

23 THE COURT: I'm just asking.

24 MR. PARKER: -- be revoked? I would have to know
25 that first because that determines whether I even have a case.

1 THE COURT: I wouldn't -- I wouldn't decide any
2 other legal issues. I'm asking you before the Court decides
3 any other legal issues --

4 MR. PARKER: Absent --

5 THE COURT: -- do you want to go talk to a
6 Magistrate Judge or -- you know, talk with Mr. Mishkin
7 yourself to try to resolve this?

8 MR. PARKER: Oh, I have -- I have -- I know exactly
9 what I would want absent a ruling on whether implied license
10 can be revoked because that also impacts me for the future --

11 THE COURT: Okay.

12 MR. PARKER: -- but I would need to know that before
13 I could make -- before -- assuming you would be giving me a
14 favorable ruling that would be -- I would -- making that
15 assumption on a favorable ruling on that for any settlement
16 talks so yes, I would be willing to explore it --

17 THE COURT: Okay, but --

18 MR. PARKER: -- but only under that premise because
19 I'm not going to assume a loss on that.

20 THE COURT: Okay, no, but I don't know what you
21 mean. If you settle the lawsuit it goes away and I make no
22 other decisions.

23 MR. PARKER: No, I know, but absent your ruling on
24 whether implied license can be revoked, I have to assume that
25 I'm going to get the favorable ruling and if you're asking me

1 to give up that favorable ruling and what would happen after
2 that, then that would impact what I would require to settle.

3 If you make the ruling on the implied license and
4 whether it can be revoked issue then I know how to proceed.
5 Absent that, then I have to proceed as if you had made a
6 favorable ruling and would -- would discuss settlement under
7 that premise --

8 THE COURT: Okay.

9 MR. PARKER: -- is what I'm saying.

10 THE COURT: All right. I still don't know what you
11 mean. So what then would be your demand to settle?

12 MR. PARKER: \$39,999 like in a Rule 68 offer --

13 THE COURT: Okay --

14 MR. PARKER: -- which would basically be the maximum
15 -- 75 -- if I recovered the maximum statutory damages at
16 trial, based on the ruling that you gave or some other ruling
17 that might affect that, if they would offer me that under Rule
18 68 and I declined it, then the odds of my recovering more than
19 75 percent of that would be next to --

20 THE COURT: Well -- okay --

21 MR. PARKER: -- would be very slim and --

22 THE COURT: Well putting aside a Rule 68 offer
23 judgment --

24 MR. PARKER: 30,000 --

25 THE COURT: -- which that's not what we're talking.

1 How much are you saying?

2 MR. PARKER: 30,000. One statutory violation of my
3 copyright, the same amount would be what I would want. Not
4 necessarily an admission of liability but that's what it would
5 take me to abandon the pursuit of the implied license ruling,
6 the trial, and laying down the law.

7 THE COURT: Okay. So --

8 MR. PARKER: I do believe I've had one violation
9 though --

10 THE COURT: Okay, all right.

11 MR. PARKER: -- so -- you know --

12 THE COURT: So the amount is -- I don't know whether
13 you said 30,000 --

14 MR. PARKER: 30,000 would be the amount.

15 THE COURT: 30,000 is your demand.

16 MR. PARKER: Well, I don't -- I don't know how the
17 process is and again, I tend to -- in chess anyway, it's
18 considered courtesy to let the opponent make the draw for --
19 if you've already offered one or -- or they've explored it,
20 not repeatedly make demands --

21 THE COURT: Right --

22 MR. PARKER: -- because you assume that if they were
23 going to offer you --

24 THE COURT: Right --

25 MR. PARKER: -- they would step forward.

1 THE COURT: No, no, no. This is your first demand.
2 Mr. Parker hasn't made a demand before this, has he?

3 MR. PARKER: That's not a demand though. I'm not
4 demanding it, I'm just saying that I would drop it --

5 THE COURT: Yes, but that's --

6 MR. PARKER: -- if that were offered.

7 THE COURT: -- it's called a demand --

8 MR. PARKER: Okay.

9 THE COURT: -- in litigation. That's all that
10 means.

11 MR. PARKER: All right.

12 MR. MISHKIN: Your Honor, the answer is no, Mr.
13 Parker has not previously made a demand.

14 THE COURT: Okay, all right. So his demand is
15 \$30,000 and then to stop picking up your material --

16 MR. PARKER: No, actually I wouldn't --

17 THE COURT: -- or you don't care about that?

18 MR. PARKER: -- that could -- it would be minor.
19 They've pretty much already done that to some extent but I
20 have more than one website. I would have to keep reporting to
21 them and then to other search engines. My right to publish
22 anonymously would be affected. So, I mean, there are things
23 there. I -- I --

24 THE COURT: But can't you do the little robot thing?

25 MR. PARKER: It's not as simple -- I would like to

1 have a trial on that issue also to show what -- you know,
2 there's a lot involved in the robots issue. On my end, if you
3 say that implied license can be revoked we have a five minute
4 trial. If you say that it can't be revoked we have protracted
5 litigation where then -- then I'm more inclined to say -- you
6 know, I don't have anything to fight for and I don't think you
7 do either --

8 THE COURT: Okay.

9 MR. PARKER: -- because I've pretty much
10 preemptively kept my stuff off the web, not just so that it's
11 not archived by them but by anyone --

12 THE COURT: Right, right.

13 MR. PARKER: -- you know. Because I can do this by
14 email and also I can switch to video which is not protected
15 this way. Like, if I make a video on the camera and then
16 upload it to the net it's not considered internet content in
17 the same -- you know, respect. So, I'm really looking as much
18 as they are for the law to be laid down.

19 But if they want to settle it and say -- you know,
20 because you've turned this into a case about my personal
21 website -- you haven't -- this doesn't -- this isn't a -- this
22 couldn't be a class action anymore. If your earlier rulings
23 had been different it might have been.

24 Though as I think as the defendant I feel like it's
25 a class action, that I'm just the only defendant who's

1 representing it. I might file a motion to that effect or
2 something.

3 THE COURT: Okay. All right. Well, Mr. Mishkin,
4 you've heard what I've heard so why don't you -- you know,
5 consider obviously that demand and then if you want to make a
6 counter offer, obviously you can do that. And but why don't
7 you try to pursue something and if you get to the point where
8 you think you want to go to a Magistrate Judge, I certainly
9 could obviously arrange that.

10 Did you want to speak, Mr. Mishkin?

11 MR. MISHKIN: Only to say, Your Honor, that I
12 certainly will convey this demand --

13 THE COURT: Sure.

14 MR. MISHKIN: -- to my client as is my obligation.
15 I don't want to -- I don't want to appear unduly optimistic
16 that -- about the outcome. My suggestion, Your Honor, is that
17 after we explore the possibility of a resolution that the next
18 step be that if a resolution is not possible, a briefing
19 schedule for Rule 56 motions because the legal issues that do
20 remain could well resolve the outstanding issue that Your
21 Honor left open in the course of the Rule 12 forward.

22 THE COURT: Okay. All right. Well let's talk about
23 where we go from here assuming for a moment that there is not
24 a settlement and that you both go forward and, Mr. Mishkin, I
25 know that you have -- well you just said it here in Court but

1 also in your papers, that you would want to do a summary
2 judgment motion.

3 MR. MISHKIN: Correct.

4 THE COURT: Without doing any discovery at all?

5 MR. MISHKIN: Correct, Your Honor. We believe these
6 are issues of law based on the pleadings as Mr. Parker has
7 presented them to Your Honor that the legal issues can be
8 resolved without any discovery.

9 THE COURT: Okay. And tell me, have you at this
10 point in your own mind framed what the legal issues are that
11 you would present to me?

12 MR. MISHKIN: Certainly they would include the
13 volitional issue that Your Honor specifically reserved from
14 the Rule 12 motion, as well as the revocability of the implied
15 license which we believe is a matter of law --

16 THE COURT: Okay.

17 MR. MISHKIN: -- and does not require any discovery
18 to resolve. Moreover, there are Digital Millennium Copyright
19 Act issues that are purely legal issues, and there is the
20 interpretation of the copyright rights that Mr. Parker has and
21 the actions of Mr. Parker's own complaint establish as a
22 judicial fact and therefore are not -- are not in any need of
23 any further discovery that we believe, again, would resolve
24 the remaining issue of the continuing.

25 THE COURT: So what would happen with your

1 counterclaims?

2 MR. MISHKIN: Well if we were to succeed on the Rule
3 56 motion with regard to Mr. Parker's claims, we would then be
4 in a position of making a determination whether to -- if we
5 can resolve the substantive claims that have been asserted
6 against Microsoft, Microsoft may decide that it need not
7 pursue the affirmative relief in the counterclaim, including
8 seeking attorney's fees although depending on the Court's
9 ruling of use of copyright and the actions that Mr. Parker has
10 taken may entitle us to relief.

11 But again, in an effort not to have this matter drag
12 on indefinitely, were we to prevail on the remaining
13 affirmative claim against us, in all candor, we would reassess
14 whether it merits further prosecution of our counterclaim.

15 THE COURT: All right. What are your thoughts on
16 that, Mr. Parker?

17 MR. PARKER: If this is on the record, first I want
18 -- you're going to deny it but -- probably -- first I want to
19 request appointed counsel because I am a indigent -- well, in
20 terms of being able to afford counsel, be it disabled or
21 functionally unable to prosecute this case as a regular
22 individual would be and -- what was the third one?

23 Oh, yes, a defendant meaning that I'm not here
24 voluntarily. So I'm just saying that without counsel I
25 believe I'm already being prejudiced, I'm --

1 THE COURT: Yes.

2 MR. PARKER: On the -- I might file a motion or
3 something, just to preserve my rights or --

4 THE COURT: Sure.

5 MR. PARKER: -- because again, I'm concerned more
6 for the individual who really hasn't worked in law offices or
7 might be a little more disoriented or -- or more unable to do
8 this than me, because I'm certainly not the most incapable
9 person on the planet but I have limitations that -- I'm being
10 sued by Microsoft so if there's ever a case where that --

11 THE COURT: Well, you sued Microsoft and I have the
12 feeling that if your suit weren't here, they would probably do
13 what was just hinted at my Mr. Mishkin so I think that's
14 what --

15 MR. PARKER: Well --

16 THE COURT: -- would happen. But go ahead.

17 MR. PARKER: -- theoretically the one case --

18 THE COURT: Tell me your thoughts.

19 MR. PARKER: -- oh, that's the other thing, I may
20 want -- I suppose separating these cases because one case you
21 have which is actually very simple which is my claim -- their
22 claims, if they're going to raise DMCA (phonetic) because this
23 is active fair use issues which go beyond even my case, now
24 you're talking about financial discovery, records discovery,
25 corporate discovery, testimony of their officers regarding

1 their motive, why they created a search engine, why I'm
2 supposed to believe that a publically traded company whose
3 mission under the very rules of the SEC are to look after the
4 shareholders first, act like they're doing this for something
5 other than money.

6 What is this higher purpose that a publically traded
7 company has? Where is it in their 10Q filings or their 12 --
8 whatever those filings are? That's if they're coming -- see,
9 again, you have two cases. You have my suit over my
10 copyright, their search engine. I'm the one creating the
11 content.

12 People go on the -- you know, people watch TV to
13 read TV Guide or they read TV Guide to find out what's on TV
14 because they're basically TV Guide. I'm the TV. I'm the one
15 making the content that the audience comes to watch. They're
16 the ones that are putting them in touch with me. It's as if
17 TV Guide is making all the money off of TV with these engines.

18 I mean, this is not a small amount of money. Yes,
19 there are ways around it. I can find them and as long -- you
20 know, that's why also I would rather the law be laid down so
21 that everybody has equality. But, when you're talking the
22 counterclaims, I have to defend myself.

23 THE COURT: Right.

24 MR. PARKER: The rules for discovery on a defendant
25 are much different than on a plaintiff --

1 THE COURT: Okay. All right.

2 MR. PARKER: -- so I need to -- if they're going to
3 come out and say we don't make a -- oh, and they claimed I
4 didn't make a profit from my books? I have plenty of checks
5 ordered them (sic). I -- I have plenty of revenue that it's
6 well documented for years from these books.

7 THE COURT: Okay.

8 MR. PARKER: I copyrighted them before the search
9 engines even really took advertising. I've been on the net
10 since 1996 or '94.

11 This is not -- you know, I didn't just arrive here
12 and say ooh -- you know, I've been building a specific
13 business and one of the reasons I've been delayed is the lack
14 of legal -- you know, with the defamation I had to pull back
15 and say okay, I can't fight that with this.

16 I may have to pull back and say I'm just going to
17 have to be -- the only copy I want in their search engine are
18 my advertising copy, my spam, so my website's just going to
19 have nothing but marketing materials. Copy that all you want.
20 So I don't even worry about the spider.

21 They did infringe my registered works or what would
22 have been infringement. Is it an abuse of copyright to defend
23 my -- to defend my copyright under a opt out policy that's
24 never been validated? I don't see what I'm abusing here. I
25 didn't register these works with this lawsuit in mind, I

1 registered them because I know on the internet people can
2 steal your work very easily. So to me, that registration is a
3 universal opt out.

4 And again, I raised a WTO issue in my answer. I
5 wasn't going to look to other countries if our Courts are
6 protecting and saying our American search engines who own 95
7 percent of this market have the total implied license to copy
8 works from Belgium, France, England.

9 You know, WTO says you can't pass laws in a country
10 that favor one country over another. The wrong rulings or
11 laws in this country can lead, as they did in offshore
12 gambling to something like Antigua getting a claim against us.

13 THE COURT: Okay --

14 MR. PARKER: If this country's entering into these
15 agreements and these treaties, I would assume that these
16 treaties are relevant to any case in the country. So when you
17 talk about the counterclaims, you're talking about this really
18 -- I'm going to fight it because I want -- I don't want them
19 to get these declaratory releases.

20 THE COURT: Okay --

21 MR. PARKER: This affects me in the -- you know, in
22 the -- my claim --

23 THE COURT: Okay --

24 MR. PARKER: -- is just a matter of what you
25 said --

1 THE COURT: Okay --

2 MR. PARKER: -- though, one ruling.

3 THE COURT: Okay, all right. All right, well then,
4 Mr. Mishkin, I think what we'll do is we'll set a schedule for
5 that motion and so we won't do discovery before but, Mr.
6 Parker, when you respond to it, and as you say, you know, you
7 do have some experience in law because your responses have
8 been -- you know, have been sometimes very much on point for a
9 non-lawyer. Very much so.

10 But what we'll do is you can then respond to it and
11 if you feel that somehow in responding you need discovery of
12 something, then you can ask for it. Do you know what I'm
13 saying, sir? Does that make sense?

14 MR. PARKER: If they say we don't profit from -- if
15 they assume facts not in evidence --

16 THE COURT: Right.

17 MR. PARKER: -- which they almost have to to get
18 these rulings, I don't see how this motion can be brought
19 without discovery.

20 THE COURT: Okay. And I have no view of it because
21 I mean, I hear what Mr. Mishkin has just said but this is the
22 first time I'm hearing what he's going to do so I don't have
23 any view of whether he's going to be successful or not or
24 whether discovery is needed.

25 But I think in view of everything I've heard this

1 morning, I will allow him to go forward, file his motion --
2 which of course as you know, Mr. Mishkin, you can always file
3 it anyway but often summary judgment motions, people don't do
4 it unless the Court says we're ready to do it so you can do
5 that but then, Mr. Parker-- and obviously I'll give you -- you
6 know, a reasonable amount of time --

7 MR. PARKER: Can I --

8 THE COURT: -- to respond. Do you have a feeling as
9 to how much time you might want? Maybe you need to see it
10 first I think. Let's --

11 MR. PARKER: Well, to respond, what I would say is
12 that -- you know, again, without discovery, we can look ahead.
13 They're going to say -- for DMCA they have to prove they don't
14 profit. How can they -- I'm getting no discovery on that
15 issue? Because if I prove that, I've knocked out every DMCA
16 claim of theirs.

17 THE COURT: Yes, well we'll see. I don't know what
18 they're going to say so when they say whatever it is they're
19 going to say, look it over, drop me a note letting me know how
20 much time you need to respond and I'm sure we won't have a
21 problem with that. And then after Mr. Parker responds, Mr.
22 Mishkin, you can do a reply.

23 MR. PARKER: I --

24 THE COURT: I will look at it. Now, if in your
25 opposition, Mr. Parker, you have said some of those issues

1 need discovery so I need discovery on them to respond, I'll
2 evaluate that and perhaps schedule another oral argument here
3 in Court or whatever, but then we'll see where we go from
4 there. And obviously if I deny the motion -- and I have no
5 view of it -- then we'll have to get together again and talk
6 about where we go from here.

7 MR. PARKER: So no discovery then until -- you're
8 not opening discovery --

9 THE COURT: Not at this point -- yes, not at this
10 point until we see whether or not Mr. Mishkin is presenting to
11 me certain issues you don't need discovery for. But you'll
12 have the opportunity to tell me that you think you do need
13 discovery, once you see what he's saying. But I think you
14 need to see what he's saying first.

15 MR. PARKER: Well wouldn't you just have to assume
16 all facts in my favor?

17 THE COURT: Yes. Well, I mean --

18 MR. PARKER: So again --

19 THE COURT: -- I had to give you all --

20 MR. PARKER: All benefits of the doubt --

21 THE COURT: Yes --

22 MR. PARKER: -- unless they can prove it through
23 some kind of affidavit but then I can counter.

24 THE COURT: I don't know what he intends to do but
25 he referred to your complaint -- Mr. Mishkin did, I shouldn't

1 say he -- Mr. Mishkin will no doubt take some facts from your
2 complaint it sounds like and then he may or may not give me an
3 affidavit. I don't know what he intends to do on that. But
4 if the affidavit presents factual issues that you need
5 discovery on, then I will hear from you and if I decide that
6 that's true, that you need to do discovery on facts that are
7 relevant, then I will make that decision.

8 I take it you're intending to make several arguments
9 that you don't to win on all of them --

10 MR. MISHKIN: That's correct, Your Honor.

11 THE COURT: -- I assume is what you're saying.

12 MR. MISHKIN: Exactly.

13 THE COURT: So, it may be that I decide he loses on
14 all of them or he wins on one. If I think he wins on one,
15 then I'm not going to -- I won't do the others probably, most
16 likely. So, there may be some that I think it's fair for you
17 to get discovery on, you need it, on others it may not be. So
18 let's see.

19 MR. MISHKIN: And it might be moot depending on the
20 nature of the motion.

21 THE COURT: Exactly, yes. So let's see what he has
22 to say. Now when can you file it, Mr. Mishkin? What are your
23 thoughts?

24 MR. MISHKIN: Your Honor, I was thinking 30 days
25 would be adequate for me.

Colloquy

37

1 THE COURT: Okay, 30 days from today. I'll do an
2 order after this but let me see -- we're at January -- what
3 are we, January 27th?

4 MR. MISHKIN: 27th, Your Honor.

5 THE COURT: So we're talking say February 27th,
6 okay?

7 MR. MISHKIN: That would be fine. Thank you, Your
8 Honor.

9 THE COURT: February 27th, and then within a week of
10 getting that, Mr. Parker, you need to tell me how much time
11 you need, okay?

12 MR. MISHKIN: Well I usually -- what's the normal
13 limit? 20 days?

14 THE COURT: It's usually 14 days --

15 MR. MISHKIN: But if I need discovery is that -- or
16 should I --

17 THE COURT: No, but you need to file something to
18 tell me you need discovery so you're going to need to file
19 something --

20 MR. PARKER: A motion for expedited discovery is it?

21 THE COURT: No, no, I would not -- no, I'm not going
22 to grant any discovery until Mr. Mishkin files his motion and
23 you oppose it, telling me what discovery you need and why you
24 need it, okay?

25 MR. PARKER: Yes, Your Honor.

1 THE COURT: And I'll try to lay that out in my order
2 as well that states February 27th. So on February 27th or
3 thereabouts, you will get his motion. You need to read it,
4 tell me how much time you need to respond. Don't -- you don't
5 need to respond to it, just tell me within a week, Judge, I
6 need 30 days, I need 45 days, 60 days -- whatever it is, okay?

7 MR. PARKER: I -- I -- what's -- the normal is 20
8 days, right?

9 THE COURT: I guess it's 14 but whatever you need,
10 Mr. Parker --

11 MR. PARKER: 14?

12 THE COURT: Yes, but I'll give you whatever you
13 need, Mr. Parker.

14 MR. PARKER: For summary judgment motion? It's not
15 20?

16 THE COURT: No, 20 is to answer a complaint. But it
17 doesn't matter what it is.

18 MR. PARKER: Okay.

19 THE COURT: I'll give you what you need, whatever
20 amount of time you need.

21 MR. PARKER: Well, you know, I tried to meet the
22 time limits so far so --

23 THE COURT: No, but that not -- it's truly not
24 necessary --

25 MR. PARKER: -- whatever --

1 THE COURT: -- I mean, if I'm going to give you as
2 much time as you need.

3 MR. PARKER: Well then we put a briefing schedule
4 together. 30 would be standard -- I would think I could --
5 unless discovery was required, in which case it would be
6 longer.

7 THE COURT: No, but even if you think discovery is
8 required, within 30 days, all you need to do is respond and
9 tell me. You can say, Judge, on issue (a), I can't respond to
10 that now because I need discovery of these three points.

11 MR. PARKER: How about --

12 THE COURT: I need to do a, b, c, and that -- and
13 when I get that information, that's going to be relevant to
14 the legal argument -- are you with me?

15 MR. PARKER: Well, they demanded a jury trial,
16 didn't they?

17 THE COURT: I don't recall at this point.

18 MR. PARKER: I believe you did on your counterclaim.

19 MR. MISHKIN: Your Honor, that has no bearing on the
20 summary judgment motion.

21 THE COURT: I have it here --

22 MR. PARKER: Well -- isn't --

23 THE COURT: -- maybe I can look at it?

24 MR. PARKER: -- isn't whether or not they profit
25 from their search engine a finding of fact for a jury, not a

1 Judge?

2 THE COURT: Sir, I don't even -- I'm not even going
3 to respond to that because I -- it's hard to do it --

4 MR. PARKER: Put it in a motion.

5 THE COURT: -- you have to know things --

6 MR. PARKER: Put it in a motion -- okay.

7 THE COURT: -- in context. Well no, not -- you
8 don't have to put it in a motion.

9 MR. PARKER: I mean in the response.

10 THE COURT: Let's find out what they're going to
11 say. We don't know what they're going to say yet.

12 MR. PARKER: Okay.

13 THE COURT: So unless I know what people are going
14 to say, I don't like to give advisory opinions. But let me
15 just look --

16 MR. MISHKIN: And, Your Honor --

17 THE COURT: -- you asked me a certain question.

18 MR. MISHKIN: -- and I've just looked at our
19 counterclaim.

20 THE COURT: Yes.

21 MR. MISHKIN: We did not demand a jury.

22 THE COURT: Yes, okay. They had not is the answer.

23 MR. PARKER: Oh, Yahoo did I think maybe then.

24 Okay. So there's no --

25 THE COURT: Okay.

Colloquy

41

1 MR. PARKER: Can I -- wait -- can I withdraw my jury
2 demand?

3 THE COURT: Sure..

4 MR. PARKER: Okay, no jury trial?

5 THE COURT: Sure.

6 MR. PARKER: That allows you to be the fact finder.

7 MR. MISHKIN: Yes, Microsoft would agree with that,
8 Your Honor.

9 THE COURT: Okay, all right --

10 MR. PARKER: So you -- you're the fact finder now.

11 THE COURT: So there's no -- okay, all right. So
12 then --

13 MR. PARKER: No voir dire if it gets to the trial.

14 THE COURT: Okay, all right, all right. So if we
15 don't -- if I don't grant summary judgment, then we'll talk
16 about discovery and a bench trial, okay?

17 MR. PARKER: Uh-huh.

18 THE COURT: Okay, all right, everybody, thank you so
19 much for coming in. I appreciate it and I will issue an order
20 along the lines of what I just said. Okay, everybody, thank
21 you very much. We're adjourned.

22 (Proceedings concluded at 10:04 a.m.)

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C E R T I F I C A T I O N

I, Diane Gallagher, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter..

Diane
Gallagher

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February 1, 2009

DIANE GALLAGHER

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